

REMARKS/ARGUMENTS

Claims 1-34 have been rejected.

Claims 1-34 have been canceled and rewritten as newly presented claims 35-46, with claims 35 and 44 being the only independent claims. Claims 35-43 are directed to that embodiment of the invention in which the food plate is convertible from a flat blank to a contoured plate and reversible back to a flat blank. Claims 44-46 are directed to the embodiment of the invention in which the plate is permanently contoured.

Applicant will demonstrate how the newly presented claims overcome all of the various grounds of rejection asserted against claims 1-34.

The specification has been amended to enhance the description without adding new matter. Applicant will point out the predicate for each such amendment in the original disclosure.

The Specification

Applicant has amended the specification for purposes of clarity and completeness and has done so without adding any new material.

At page 3, on the last line, the specification has been amended to insert the parenthetical “end areas” as alternative terminology for the word “sections.”

At page 4, line 9, Applicant has inserted “...from end area 16a and end area 16b...” to more clearly identify the areas of the sheet material that are in an overlapping configuration.

At page 4, line 11, the pronoun “it” has been replaced by “...the blank

10..." so there is no misunderstanding as to what was being referred to.

At page 4, line 14, the word "overlapping" has been inserted between the word "stressed" and "configuration," which is consistent with that which comes before it and the drawings, especially Fig. 3.

At page 4, line 16, the reference to "plate 31" has been replaced by reference to "blank 10" which are essentially the same item, but in different configuration.

At page 4, line 18, the word "overlapping" has been inserted between the word "stressed" and "configuration" to be consistent with that which goes before.

At page 4, lines 23 through 27, the sentence starting with "other devices" and ending with "two elements together" has been deleted as too obvious to require either disclosure or a drawing.

At page 4, lines 30-31 have been edited to more fully describe the invention and they are fully consistent with the description that precedes it.

At page 5, line 1, the parenthetical "(apex)" has been inserted as an alternative term for "low point."

At page 5, line 3, added to the end of the line is the descriptive material: "with its low point (apex) 34 at the approximate midpoint of longitudinal bow 33." This is clearly disclosed in the drawings, especially in Figs. 4 and 5.

At page 5, line 4, the shape formed by the lateral bow 32 and the longitudinal bow 33 are as not only concave, but also as "generally conical shaped," as is obvious and clear from the drawings and the description of the

invention.

At page 5, line 20, an amendment has been made to point out that the material in the concave food-holding area is continuous and thereby able to retain fluids, which is fully described in the original specification.

At page 6, line 32, it is stated "the apex 34 and end edge 14 are in the same horizontal plane...", which, once again, is fully disclosed in the drawings. See particularly Fig. 4.

Accordingly, Applicant submits that the amendments should be made, as they do not introduce any new matter.

The Drawings

Applicant has eliminated from the specification on page 4 the obvious alternatives to a hook and slot retaining device and has also eliminated those from the claims so as to obviate the objection to the drawings.

The Claims

Applicant has elected to rewrite the claims, rather than make extensive amendments to the originally submitted claims. Thus, claims 35-46 are submitted as clearly defining Applicant's invention over the prior art as applied to the originally submitted claims.

Before addressing the specific rejections, Applicant would point out that if anything, the cited prior art relating to food trays and the like are so clearly distinguishable from Applicant's invention based solely on the appearance that there should be no question but that Applicant has made an invention, the only issue is whether or not Applicant has set forth in the claims those

features which distinguish his invention over the prior art.

The only prior art cited by the Examiner that even remotely relates to Applicant's structure is the disposable artist palette of Broyles et al., patent 5,850,910, which is not only from an unrelated art, but, moreover, does not meet the requirements set forth in the claims by which the structure can serve as a food tray. Applicant will distinguish Broyles more fully below.

Claim Rejections - 35 U.S.C. Section 102

2. "Claims 1-6 rejected under 35 U.S.C. 102(b) as being anticipated by Randall (2,766,919)."

Randall is directed to a food holder for transporting food from one place to another and is not specifically designed for being held in one hand while consuming the food held in the carrier. Claim 35 clearly distinguishes over Randall in that it specifies the features of Applicant's invention by which it can be converted from a flat sheet of material into a contoured food tray and, in particular, it specifies a split in the sheet that permits areas of the material to be brought into an overlapping configuration which automatically causes a conical concave area and a pre-stressed generally flat area. Furthermore, by releasing the overlapping areas, the tray can be reconfigured into a flat sheet of material for convenient storage and transportation. None of these features are found in Randall and, thus, Randall cannot be the basis of a 102(b) rejection.

Claim 44 also distinguishes over Randall by specifying that the concave area extends from and between the side edges wherein Randall's depressed area 34 does not extend to the edges. Furthermore, Applicant's concave area has a conical shape with an apex, wherein the apex acts as a point of contact with a

horizontal surface to maintain the food-carrying portion relatively horizontal when the tray is set down. Whereas, Applicant's invention, according to claim 44, is supported at the apex and the depending end edge 14, in Randall, the entire tray has a depending periphery which supports the tray when it is set down on a horizontal surface.

Once again, Randall does not meet all of the limitations of claim 44 and, thus, cannot be a proper basis for a rejection under 102(b).

To anticipate a claim, the reference must teach every element of the claim. MPEP 2131. "A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. Of California*, 814 F.2d 628, 631, 2 USPQ@d 1051, 1053 (Fed. Cir, 1989)

9. "Claim 21 is rejected under 35 U.S.C. 102(b) as being anticipated by Yanuzzi (5,390,379)."

Yanuzzi is directed to a tray designed to hold a plate, as well as a drinking vessel, and does not have the convertible features specified in Applicant's newly submitted claim 35. Nothing in Yanuzzi suggests that a flat sheet of material can be contoured into a food-holding plate by simple reconfiguration that can be reversed so as to return the plate to its flat, uncontoured condition.

Similarly, Yanuzzi does not meet the limitations of claim 44 specifying that the contour runs from side to side and forms a conical shaped concave food-holding area. Yanuzzi contemplates that the food will be held by a plate which is held in the orifice 19 which, having no bottom, is incapable of holding

food by itself.

Thus, Yanuzzi is not a proper reference for a 102(b) rejection of claim 35 or 44.

10. "Claims 21, 22, 25 and 26 are rejected under 35 U.S.C. 102(b) as being anticipated by Sorensen et al. (6,401,927)."

Sorensen is directed to a food tray for combination meals that is formed by a cardboard blank with numerous cut-outs and score lines which require substantial folding and construction in order to configure it into a useful article.

Sorensen fails to disclose Applicant's invention by which a simple, generally rectangular flat sheet of flexible material is automatically contoured into a concave conical section and a generally flat pre-stressed section by the simple expedient of overlapping areas at an end edge. Sorensen does not teach that the sheet is bowed from side to side, as well as longitudinally, to form the concave area for holding food and, thus, is not the proper basis for a 102(b) rejection.

Claim Rejections - 35 U.S.C. Section 103

15. "Claims 1-2, 6-10, 12-13 and 29-32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hemingway et al (6,988,614) (Hemingway) in view of Broyles et al. (5,850,910) (Broyles)."

Hemingway teaches a disposable folding food tray, the novel feature of which is that when a beverage container is mounted on the food tray, the tray can be supported by holding onto the beverage container.

Hemingway et al. does not teach a convertible, flat, flexible rectangular sheet of material that is formed into the contours of a concave conical section

and a flat section by overlapping end areas, not does it suggest or purport that it is capable of supporting or holding food products that have fluid. In all of the configurations of Hemingway, the section of the carrier to which a beverage container is mounted is of a box construction having spaced-apart bottom and top sections supported by side walls, as best seen in Fig. 3.

The Examiner points out that Hemingway does not teach a concave area in a sheet near the first end edge. To cure this deficiency, the Examiner suggests that Broyles could be combined with Hemingway to meet this limitation.

Broyles is directed to a disposable artist palette which is configured not from a generally rectangular flat sheet of flexible material, but rather a more circular shaped sheet of material, and, more importantly, when the material is configured to form an overall concave structure, it has no flat area and requires for its utility that at the very bottom of the concave area, there be a hole of sufficient size for the artist's thumb to pass through. Needless to say, this would be a most impractical food tray, since not only would the hole provide a place for liquid to leak out, the food would necessarily accumulate around the thumb of the person supporting the palette. Thus, any suggestion that Broyles would be adaptable to a food tray is far fetched.

Furthermore, there is nothing in Hemingway to even remotely suggest that the flat area adjacent to the cup-holding area would benefit in any way by being contoured, as opposed to flat. In every single embodiment of the numerous embodiments disclosed in Hemingway, the section of the carrier

adjacent to the beverage-holding area is perfectly flat. The food plate of Hemingway is specified as being disposable and, thus, made out of cardboard.

Furthermore, the suggestion that Hemingway be modified by causing flat area 68 to be contoured, as taught by Broyles, is nothing more than a suggestion based on the hindsight provided by Applicant's invention. This has long been an improper basis for combining reference and, thus, the suggested combination is impermissible.

In re Fritch, 23 USPQ2d 1780 (CAFC 1992):

“Obviousness cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching or suggestion supporting the combination. Under Section 103, teachings of references can be combined *only* if there is some suggestion or incentive to do so.”

Even if the impermissible combination is made, Applicant's invention does not result, since the application of Broyles to section 68 of Hemingway does not provide pre-stress to the beverage-containing area 23, which, because of its box construction, does not require any pre-stress.

One of the advantages of Applicant's invention is the economy of materials required to create a stable food tray and Hemingway illustrates by contrast the novelty of Applicant's invention in that Hemingway requires at least twice the material of Applicant's invention to achieve a lesser result.

22. “Claims 11, 33 and 34 are rejected under 35 U.S.C. 103(a) as being unpatentable as modified by Broyles in view of Arneson.”

Applicant has already demonstrated above that the combination of Hemingway and Broyles is an improper combination and even if made, does not result in Applicant's claimed invention. Arneson is cited merely for the fact

that it employs gussets. Once again, Applicant submits that the Examiner has merely trolled the prior art for elements of Applicant's invention and then, on the basis of Applicant's teaching, suggested that they be combined. Nothing in the cited prior art suggests that such combination be made or that it would be advantageous if made.

23. "Claim 14 is rejected under 35 U.S.C. 103(a) as being unpatentable over Hemingway as modified by Broyles in view of Goings (3,638,849)."

Applicant has withdrawn the claim specifying a snap and, thus, this rejection is moot.

24. "Claim 15 is rejected under 35 U.S.C. 103(a) as being unpatentable over Randall in view of Forestal et al. (5,152,398).

It was clearly demonstrated above that Randall does not anticipate Applicant's invention. Applicant concedes that the feature of an opening by which the stem of a wine glass can pass to the cutout for holding a vessel is old in the art. That feature, however, is not relied upon for novelty in Applicant's claims, but rather the novelty resides in the particular contours which are absent from Randall and Forestal.

25. "Claims 16 and 17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hemingway as modified by Broyles in view of Sorensen."

Once again, the combination is impermissible and even if made, does not achieve Applicant's invention. No matter how one puts Hemingway, Broyles and Sorensen together, they do not provide a convertible tray having the specific contours specified in independent claims 35 and 44.

26. "Claims 18-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Randall or Hemingway as modified by Broyles in view of Yanuzzi."

Once again, Applicant submits that the failure of any suggestion in the prior art of any combination of the cited references makes the combination improper and represents a classic case of hindsight based on Applicant's invention.

In re Fine, 5 USPQ2d 1596 (CAFC 1988):

...The PTO has the burden under section 103 to establish a *prima facie* case of obviousness. It can satisfy this burden only by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references. In re Fine, at page 1598. (Emphasis added)

The Board reiterated the Examiner's bald assertion that "substitution of one type of detector for another in the system of Eads would have been within the skill of the art," but neither of them offered any support for or explanation of this conclusion. In re Fine, at page 1599. (Emphasis added)

One cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention. In re Fine, at page 1600.

27. "Claims 21-22 and 27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Broyles in view of Brown (2,563,455)."

Brown is directed to a container of general rectangular box-like construction having an insert with numerous openings by which a variety of different shaped containers can be stored within the box and transported thereby. The argument that Broyles discloses Applicant's invention other than a hole for receiving a receptacle is not accurate as to claims 35 and 44. Broyles does not teach the formation of contours including a conical concave section that is continuous and, therefore, can hold fluid and a contiguous flat section that is pre-stressed by the conical section. Thus, even if a hole were placed

along the outer edge of Broyles, it would not function as a food tray, as the hole at the bottom of the contour would provide a ready escape for any food that went to the bottom of the concave section and if the hole in the concave section were plugged with a thumb, as suggested by Broyles, the food would be placed on top of the thumb, which is highly undesirable. In any event, there is no flat section in Broyles, without which a hole for a fluid receptacle would not work.

31. "Claims 23 and 28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Broyles as modified by Brown in view of Arneson."

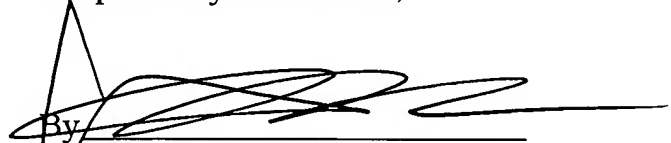
The failure of Broyles and Brown to anticipate Applicant's claimed invention is set forth above.

Conclusion

The newly submitted claims all contain limitations that distinguish over the cited prior art patents, taken alone or in combination. Therefore, Applicant requests that a Notice of Allowance be issued.

Respectfully submitted,

Dated: March 27, 2007


By _____
H. Michael Brucker
Reg No. 19,737
Attorney at Law
5855 Doyle Street, Suite 110
Emeryville, CA 94608
(510) 654-6200